FILED
JUL 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1926

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1986

CHICAGO BRIDGE AND IRON COMPANY,
a corporation,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON, and
REX T. NISSEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION III, OF
THE STATE OF WASHINGTON

BRIEF OF DEPARTMENT OF LABOR AND INDUSTRIES IN OPPOSITION

KENNETH O. EIKENBERRY
Attorney General

TIMOTHY R. MALONE
(Counsel of Record)

MAUREEN A. MANNIX
Assistant Attorneys General
Attorneys for Respondents
State of Washington

Office of the Attorney General
1200 Dexter Horton Building
Seattle, WA 98104
Telephone: (206) 464-5333

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

TABLE OF CONTENTS

	Page
REASONS WHY THE PETITION SHOULD BE DENIED	1
THE PETITIONER'S FEDERAL CLAIM IS COMPLETELY WITHOUT MERIT	1
The Interpretive Problem Giving Rise To The Petitioner's State Law Claim	2
The Basis For Rejecting The State Law Claim	4
The Petitioner's Federal Claim	5
CONCLUSION	8
APPENDICES	A-1—E-1

TABLE OF AUTHORITIES

FEDERAL CASES

Page

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 6, 7

WASHINGTON STATE CASES

Ashenbrenner v. Department of Labor & Indus., 62 Wn.2d 22, 380 P.2d 730 (1963) 3

Barlia v. Department of Labor & Indus., 23 Wn.2d 126, 160 P.2d 503 (1945) 3

Bodine v. Department of Labor & Indus., 29 Wn.2d 879, 190 P.2d 89 (1948) 3

Lynch v. Department of Labor & Indus., 19 Wn.2d 802, 145 P.2d 265 (1944) 3

UNITED STATES CONSTITUTION

U.S. Constitution, Fourteenth Amendment, Section I, (Due Process Clause) .....passim

FEDERAL STATUTES

Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792 6

Black Lung Benefits Act of 1972, 86 Stat. 150 6

STATE STATUTES

Wash. Rev. Code § 51.16.120 ..... 3, 5

Wash. Rev. Code § 51.44.040 3

WASH. ADMIN. CODE

§ 296-15-220 4

No. 86-1926

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

CHICAGO BRIDGE AND IRON COMPANY,
a corporation,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON, and
REX T. NISSEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS, DIVISION III, OF
THE STATE OF WASHINGTON

BRIEF OF DEPARTMENT OF LABOR AND INDUSTRIES IN OPPOSITION

The respondent Department of Labor and Industries respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals, Division III, of the State of Washington.

REASONS WHY THE PETITION SHOULD BE DENIED

THE PETITIONER'S FEDERAL CLAIM IS COMPLETELY WITHOUT MERIT

This petition is an imaginative effort to turn a garden-variety question of state law, involving solely the interpretation of a state statute, into a question of federal constitutional law. Stripped to its essentials, the petitioner's claim is that when a state court is faced with an arguably ambiguous state statute, susceptible of two alternative interpretations, the Due Process Clause of the Fourteenth Amendment requires a court to choose the interpretation more favorable to the petitioner's pocket book. The basis asserted for such a claim is that the petitioner would otherwise be deprived of a property interest without constitutionally adequate notice.

In examining the petitioner's federal constitutional claim, and the legal alchemy it would entail, we first review briefly the petitioner's state law claim, and the reasons why the state court rejected it.

The Interpretive Problem Giving Rise To The Petitioner's State Law Claim.

Before 1971, the petitioner, along with other employers in Washington State, was required to be insured under the state-operated workers' compensation system for industrial injuries. Private insurance and self-insurance were not permitted as a substitute for the state operated system. As with other insurance systems, the state system for workers' compensation established various classes of insureds, with the premium rates differing for each class. Employers in the heavy construction business, for example, would pay higher premiums than an employer in the restaurant business, because of the higher risk of injury to workers in the construction business. And the premium rates for employers in the construction business, of course, were based upon the loss experience of employers within that class. Further, the premium rate for a particular class was only a base rate, which could be increased or decreased for a particular employer within that class in accordance with that employer's specific loss experience.

This policy of varying the premium rates in accordance with the employer's loss experience, combined with a policy of encouraging the re-employment of previously injured workers, has been embodied in the state system from well before 1971 to the present. Integration of these two policies is accomplished through what is designated as the second injury fund. *See* Wash. Rev. Code § § 51.16.120 and 51.44.040.[1] A subsequent employer might be reluctant to hire a previously injured worker if that employer were required to pay, in the event of a second injury, premiums based upon the combined effect of both the first and second injuries. The second injury fund addresses that potential problem by operating as an accounting device for separating out the effects of the first and second injuries. This separation has the effect of charging the subsequent employer only with the second injury which is then used as the basis for determining the premium rate for the subsequent employer. This reduces the subsequent employer's rate from what it would have been if the combined effect of the two injuries were charged to the subsequent employer.

The second injury fund operates also as the source for the actual payments to the injured worker, to the extent that the payments are attributable to the effect of the first injury. (*See* Appendices A, B, and C.) Stated otherwise, the second injury fund is used to make up the difference between what the subsequent employer is charged against his experience record and the total cost of the award to the injured workman.

The second injury fund itself, of course, needs a source of financial support; and that source is the "acci-

---

[1]In Appendices A through E, we reproduce various versions of Wash. Rev. Code § § 51.16.120 and 51.44.040, to show the evolution of the second injury fund from 1943 to the present. It has been long established that under Washington's industrial insurance law, the rights and obligations of the parties which control throughout the administration of a claim are those existing on the date of the worker's injury. *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22, 380 P.2d 730 (1963); *Bodine v. Department of Labor & Indus.*, 29 Wn.2d 879, 190 P.2d 89 (1948); *Barlia v. Department of Labor & Indus.*, 23 Wn.2d 126, 160 P.2d 503 (1945); *Lynch v. Department of Labor & Indus.*, 19 Wn.2d 802, 145 P.2d 265 (1944). Since respondent Nissen's injury occurred in 1974, the statutes then in effect are controlling. *See* App. B and D.

dent" fund, into which all employers under the state system pay their premiums. The second injury fund is financed on an "as needed" basis from that accident fund, which is used to pay all other workers' compensation claims as well. Thus the second injury fund is in effect financed by other employers insured under the state system.

The purpose and operation of the second injury fund thus fits smoothly with the operation of the state system as a whole. In 1971, however, employers were allowed to become self-insurers and thereby opt out of the state system. This change gave rise to the interpretive problem involved in this litigation. Did the benefit of the second injury fund now extend to self-insurers? The petitioner claimed that it did.

In authorizing the new system of self-insurance in 1971, the legislature gave no directions as to how the second injury fund was to fit—or whether it was to fit at all—with the self-insurance system. The new optional system was just dropped alongside the existing state system, without any apparent recognition by the legislature of any interaction between the two.

This problem was cleared up by the legislature in 1977, when it expressly authorized self-insured employers to obtain relief from the second injury fund *and* provided for assessments against those employers so that they would share as well in the financial support of the fund. *See* App. C and E. *See* also Wash. Admin. Code § 296-15-220, which establishes the equivalent of a separate second injury fund solely for self-insurers.

Until 1977, however, the relationship, if any, between the second injury fund and the new system of self-insurance remained a problem for the courts to solve. And their solution was to hold that there was no relationship at all.

The Basis For Rejecting The State Law Claim.

In holding that the benefits of the second injury fund did not inure to self-insured employers, the courts focused upon the financing source for the second injury fund, *viz.*, the accident fund. Until the 1977 amendments, there was no way by which self-insured employers would pay, directly or indirectly, for the financial support of the second

injury fund. For they were no longer required to make any premium payments at all into the accident fund, from which the operation of the second injury fund was financed. *See* Pet. 3a and 4a.

The state courts took this fact as an indication of legislative intent that the new self-insurance system was to be absolutely self-contained, with no relationship to the second injury fund, and accordingly held that self-insured employers were not entitled to the benefits of the second injury fund. In effect, the Washington courts held that a decision by an employer to opt out of the state system, by becoming self-insured, was a decision to opt out of the *entire* system, including any participation in the benefits and burdens of the second injury fund.[2]. *See* Pet. 3a-5a.

The petitioner now argues that this result somehow deprives it of property without due process of law. Such a contention is completely without merit.

The Petitioner's Federal Claim.

The petitioner states:

> Although Chicago Bridge and Iron could have elected to remain a state-insured employer without a constitutional deprivation of property, that option is meaningless unless the employer may fully understand the ramifications of making that election and the implications of the legislation.

(Pet. 10)

The petitioner, however, was obviously not interested in fully understanding the ramifications of making that election until this litigation. Certainly the petitioner knew,

---

[2]Although not mentioned by the court below, it should be noted that the terminology of the statutes governing the operation of the second injury fund fits only the state system, not the self-insurance system. For example, the version of Wash. Rev. Code § 51.16.120 in effect in 1971 referred to "accident cost rate." *See* App. B. This term had applicability only to employers under the state system, since it refers to the record of injuries for each employer which was used by the Department of Labor and Industries to determine the rate of the premiums to be paid into the accident fund, as explained above. For self-insured employers, who do not pay into the accident fund, there was no need to determine any "accident cost rate." In 1972, the term "experience record" was substituted for "accident cost rate." *See* App. B. But the new term performs the same function as the old and, like the old, has no function at all with respect to self-insured employers.

when it decided to leave the state system immediately after it was afforded that election in 1971, that it would not be paying premiums into the accident fund and thus would not be responsible in any way for the financial support of the second injury fund. Yet it was not curious enough to ask the state agency involved, the Department of Labor and Industries, whether it would still be a beneficiary of that fund. The possibility that the applicable statutes might be construed so as to prevent the petitioner from becoming a "free rider"—entitled to the benefits, but free of the burdens—should have been obvious to the petitioner. Yet it made no effort to obtain a ruling on the matter, either from the Department or from the courts, through a declaratory judgment action.

Moreover, petitioner misperceives the property interest of which it is supposedly being deprived. Petitioner contends that it is being deprived of the right to benefits from the second injury fund, and would have this Court focus solely upon that right. But under the state system, that right was always accompanied by and inextricably linked to an obligation, *i.e.*, the obligation to make premium payments into the accident fund and thereby support the second injury fund. What the petitioner is really claiming now is a wholly new right which it never had before, *i.e.*, a right to benefits from the second injury fund unencumbered by an obligation to make payments into the accident fund. In short, the property interest which the petitioner now claims—the right to be a free-rider—never existed, and the property interest which it actually had was voluntarily relinquished when it elected to become self-insured.

The petitioner not only misperceives the property interest involved, but misperceives as well the scope of protection which the Due Process Clause affords. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), employers in the coal mining industry contended that the 1972 amendments to the Federal Coal Mine Health and Safety Act of 1969 violated the Due Process Clause, by imposing upon the employers an unexpected liability for workers' injuries. The amendments under challenge actually imposed liability retroactively, by requiring the employers to

compensate former employees with black lung disease who had terminated employment before the amendments were passed. The Court rejected the Due Process claim, stating:

> But our cases are clear that legislation readjusting rights and burdens are not unlawful solely because it upsets otherwise settled expectations.

Usery, 428 U.S. at 16.

In *Usery*, to be sure, the employers were contending that the 1972 amendments themselves were unconstitutional, while the petitioner here is making a somewhat different claim. But that difference brings into focus the most striking aspect of the petitioner's federal claim—an aspect which makes that claim completely untenable. The petitioner is not claiming that the 1971 amendments, or indeed any part of them, are unconstitutional, and thus inapplicable to the petitioner. Rather, it is claiming that the interpretation and effect which the Washington courts have given those amendments were not explicitly spelled out by the legislature—which is, of course, entirely correct and is the very reason why the amendments were before the courts for construction in the first place. But petitioner then argues that because the effect was not clearly spelled out, the Due Process Clause requires that the interpretation most favorable financially to the petitioner must be adopted by the courts. And thus ordinary questions of statutory interpretation, which provide so much of the everyday work of the state and federal courts, would automatically be transformed into Due Process questions.

The astounding scope of the petitioner's theory should alone require its rejection.

CONCLUSION

For the reasons given above, the petition for certiorari should be denied.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

TIMOTHY R. MALONE

MAUREEN A. MANNIX
Assistant Attorneys General

Attorneys for Respondent
State of Washington

APPENDIX A: 1943 SECOND INJURY FUND
(RCW 51.16.120)

Whenever a workman has sustained a previous bodily infirmity or disability from a previous injury or disease, and shall receive a further injury or disease, and become totally and permanently disabled from the combined effects thereof, then the accident cost rate of the employer at the time of said further accident shall only be charged with the accident costs which would have resulted solely from said further accident had there been no pre-existing disability and which accident cost shall be based upon the experience of the department in similar injuries. The difference between the charge thus assessed to the employer at the time of said further accident and the total cost of the pension reserve shall be charged to the class in which the last injury occurred.

Laws of 1943, ch. 16 § 4A, p. 31

APPENDIX B: 1972 SECOND INJURY FUND
(RCW 51.16.120)

Whenever a workman has sustained a previous bodily infirmity or disability from any previous injury or disease and shall suffer a further injury or disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof, then the ((~~accident cost rate~~)) experience record of the employer at the time of said further injury or disease shall be charged only with the accident cost which would have resulted solely from said further injury or disease, had there been no pre-existing disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to the employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury ((~~account~~)) fund.

Laws of 1972, 1st Ex. Sess. ch. 43, § 13, p. 84

APPENDIX C: 1977 SECOND INJURY FUND
(RCW 51.16.120)

(1) Whenever a ((~~workman~~)) worker has ((~~sustained~~)) a previous bodily ((~~infirmity or~~)) disability from any previous injury or disease and shall suffer a further disability from injury or occupation disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof or die when death was substantially accelerated by the combined effects thereof, then the experience record of ((~~the~~)) an employer insured with the state fund at the time of said further injury or disease, shall be charged and a self-insured employer shall pay directly into the reserve fund only ((~~with~~)) the accident cost which would have resulted solely from said further injury or disease had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to ((~~the~~)) such employer at the time or said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund. The department shall pass upon the application of this section in all cases where benefits are paid for total permanent disability or death and issue an order thereon appealable by the employer. Pending outcome of such appeal the transfer or payment shall be made as required by such order.

(2) The department shall, in cases of claims of workers sustaining injuries or occupational diseases in the employ of state fund employers, recompute the experience record of such employers when the claims of workers injured in their employ have been found to qualify for payments from the second injury fund after the regular time for computation of such experience records and the department may make appropriate adjustments in such cases including cash refunds or credits to such employers.

(3) To encourage employment of injured workers who are not reemployed by the employer at the time of injury, the department may adopt rules providing for the reduction or elimination of premiums or assessments from subsequent employers of such workers and may also adopt

rules for the reduction or elimination of charges against such employers in the event of further injury to such workers in their employ.

Laws of 1977, 1st Ex. Sess., ch. 323, § 13, p. 1239

APPENDIX D: 1972 SECOND INJURY FUNDING
(RCW 51.44.040)

(1) There shall be ((~~a special account within the accident~~)) in the office of the state treasurer, a fund to be known and designated as the "second injury ((~~account~~)) fund," which shall be used only for the purpose of defraying charges against it as provided in RCW 51.15.120. Said fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.

((~~The charge to each class of the accident fund to defray charges against the second injury account shall be made on June 30th and December 31st of each year; and the total industrial insurance premium contributions of each class for the preceeding calendar year shall be used in determining the proportionate charge to each class for the second injury account.~~)) (2) Payments to the second injury fund from the accident fund shall be made pursuant to rules and regulations promulgated by the director.

Laws of 1972, 1st Ex. Sess. ch. 43 § 27 p.97

APPENDIX E: 1977 SECOND INJURY FUNDING
(RCW 51.44.040)

(1) There shall be in the office of the state treasurer, a fund to be known and designated as the "second injury fund", which shall be used only for the purpose of defraying charges against it as provided in RCW 51.16.120 as now or hereafter amended. Said fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.

(2) Payments to the second injury fund from the accident fund shall be made pursuant to rules and regulations promulgated by the director.

(3) Assessments for the second injury fund shall be imposed on self-insurers pursuant to rules and regulations promulgated by the director to ensure that self-insurers shall pay to such fund in the proportion that the payments made from such fund on account of claims made against self-insurers bears to the total sum of payments from such fund.

Law of 1977, 1st Ex. Sess., ch. 323, § 21, p. 1242